SPECIFIC PERFORMANCE—MUTUALITY—NEW YORK RULE.—The assignee of a vendee of real property not yet conveyed sued the vendor for specific performance. The plaintiff had assumed the obligations of the vendee and tendered performance to the defendant. *Held,* specific performance denied because of a wilful default on the plaintiff's part, but were it not for that fact, the decree would have been granted. *Arrow Holding Corp.* v. *McLaughlin* (Sup. Ct., Sp. T. 1921) 116 Misc. 555, 190 N. Y. Supp. 720.

The dictum of the instant case harmonizes with the general trend of the authorities. *Perry* v. *Paschal* (1897) 103 Ga. 134, 29 S. E. 703; *Hunt* v. *Hayt* (1887) 10 Colo. 278, 15 Pac. 410. The prevailing New York view, however, has been considered to be that where there is no mutuality of obligation, specific performance is denied. See (1916) 16 COLUMBIA LAW REV. 443, 450. This rule falls short of producing substantial justice, because it deprives a plaintiff who is willing to perform, of the benefit of the contract assigned to him, and permits a defendant to repudiate his obligation, although he would get all that he bargained for, if compelled to perform. The instant case indicates a tendency of the New York courts to limit this anomalous doctrine to the very cases which have already been decided in accordance with it. Heretofore at least one lower court case has been decided in accord with the dictum of the instant case. *Dodge* v. *Miller* (1894) 81 Hun. 102, 30 N. Y. Supp. 726, approved in *Veeder* v. *Horstman* (1903) 85 App. Div. 154, 160, 83 N. Y. Supp. 99. Although simplicity is desirable, it is submitted that the principle involved in the dictum of the instant case should be adopted as the New York rule, and that the cases already decided contrary to it should be considered sharply limited exceptions.

TAXATION—WRONGFULLY COLLECTED TAXES—LIABILITY OF FEDERAL COLLECTOR.—The plaintiff sues the defendant tax collector for taxes wrongfully collected and paid into the Treasury by a former collector. *Held,* Mr. Justice McKenna and Mr. Justice Clarke dissenting, an action against a collector to recover taxes wrongfully collected being personal, the defendant is not liable. *Smietanka, Collector of Internal Revenue* v. *Indiana Steel Co.* (1921) 42 Sup. Ct. 1.

Claims to recover taxes wrongfully collected over protest, if for less than ten thousand dollars, may be brought against the United States in the Court of Claims. (1911) 36 Stat. 1093, U. S. Comp. Stat. (1916) § 991 (5); *United States* v. *Emery, Bird, Thayer Realty Co.* (1915) 237 U. S. 28, 35 Sup. Ct. 499. Whatever the amount of the claim, the Commissioner of Internal Revenue is authorized to refund it on appeal. (1866) 14 Stat. 111, U. S. Comp. Stat. (1916) § 5944. At common law, the remedy was against the collector. *International Paper Co.* v. *Burrill* (D. C. 1919) 260 Fed. 664. He was personally liable. *Elliott* v. *Swartwout* (U. S. 1836) 10 Pet. 137. Collectors now have to transfer all funds collected by them to the Treasury. (1839) 5 Stat. 348, U. S. Comp. Stat. (1916) § 5713. This was held to free them from liability. *Cary* v. *Curtis* (U. S. 1845) 3 How. 236. Under subsequent statutes, the action against the collector survives, but upon certificate by the court that the collector has acted with probable cause, he is protected from execution under the judgment, which is paid out of the Treasury. (1863) 12 Stat. 741, U. S. Comp. Stat. (1916) § 1635. Even in the absence of such a certificate, the collector of the taxes seems to be protected by 14 Stat. 111, *supra; United States* v. *Frerichs* (1888) 124 U. S. 315, 8 Sup. Ct. 514 (*semble*). But the action remains personal. *Patton* v. *Brady, Ex'x* (1902) 184 U. S. 608, 22 Sup. Ct. 493. And a collector would be unprotected by statute against execution under a judgment obtained in a suit begun against him for taxes wrongfully collected by his predecessor, whether or not a certificate of probable cause had been issued. *Roberts* v. *Lowe*

(D. C. 1916) 236 Fed. 604. The instant case rightly follows this decision. The plaintiff has other adequate remedies; the defendant is in no way responsible for the wrongful collection, and it would be great injustice to make him personally liable, as would result were a judgment taken against him.

TRIALS—EXTENDED EXAMINATION BY THE JUDGE.—In the course of a jury trial, the judge examined the defendant at great length. The jury rendered a verdict for the plaintiff. The defendant contends that the extended examination by the trial judge was error. *Held,* a new trial should be ordered since the extended examination must have prejudiced the minds of the jury. *David & Co.* v. *Ginsberg* (Sup. Ct. App. T. 1921) 188 N. Y. Supp. 72.

Examination by the trial judge which indicates that he disbelieves the witness is reversible error because the court influences the jury in determining the credit to be given to the witness. *Barlow* v. *Parsons* (1901) 73 Conn. 696, 49 Atl. 205; *Hudson* v. *Hudson* (1892) 90 Ga. 581, 16 S. E. 349. There is no reversible error merely in the improper examination of a witness when the verdict shows no prejudice has resulted. *Knox* v. *Fuller* (1900) 23 Wash. 34, 62 Pac. 131. An examination which is conducted in such a fashion that it indicates that the judge is on the side of one party is ground for reversal. *Bolte* v. *Third Ave. R. R.* (1899) 38 App. Div. 234, 56 N. Y. Supp. 1038. But the instant case goes further and says that the mere extended examination gives rise to prejudice. It seems difficult to sustain such a position, for if the questions asked by the judge are proper and do not indicate his views on the issue, it is impossible to see how either side can have been prejudiced. The better view seems to be that mere active questioning by the trial judge is not a ground for a new trial. *Bauer* v. *Beall* (1890) 14 Colo. 317, 23 Pac. 345. Not the length but the character of the examination is its objectionable feature.

USURY—EQUITABLE RELIEF—PAYMENT OR TENDER OF AMOUNT DUE.—A Rhode Island usury statute made a violation punishable as a misdemeanor and gave the borrower an action at law to recover any portion of the principal or interest paid upon an usurious contract. The plaintiff filed a bill in equity for the cancellation and surrender of a note made by him to the defendant for money loaned at an usurious rate of interest. *Held, inter alia,* the plaintiff must tender the principal of the loan, with legal interest, before equity will grant relief. *Moncrief* v. *Palmer* (R. I. 1921) 114 Atl. 181.

Usurious contracts are void by statute and so are unenforceable at law. Equity likewise recognizes their invalidity and denies relief to a lender who seeks enforcement of an usurious obligation, irrespective of repayment by the borrower. *Union Bank* v. *Bell* (1862) 14 Ohio St. 200. But where the borrower asks affirmative relief he must first pay or tender the loan with legal interest. *Fanning* v. *Dunham* (N. Y. 1821) 5 Johns. Ch. 122. This rule is based on the maxim that "he who seeks equity must do equity." See *Ballinger* v. *Edwards* (1847) 39 N. C. 449, 452. For in the view of the equity court it would be against conscience that the borrower should have relief and at the same time pocket the money loaned. The rule has been abrogated by statute in some states. N. Y. Cons. Laws (1909) c. 25, § 377. Where the loan has been repaid with legal interest, the borrower may replevy the instrument evidencing the indebtedness. *Griswold* v. *Dugane* (1910) 148 Iowa 504, 127 N. W. 664. Since this is an adequate legal remedy it would seem on strict grounds that in such a case equity should have no jurisdiction. Under the ordinary usury statute, where the borrower cannot recover money he has repaid, the practice followed in the instant case seems sound. But where, as in Rhode Island he can recover back at law any repayment he has made, the decision is directly con-